

Committee on Resources

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Testimony of Keller George

United South and Eastern Tribes, President

and

Member of the Oneida Indian Nation

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"Can a Process be Developed to Settle Matters Relating to
the Indian Trust Fund Lawsuit? "

Good morning, Mr. Chairman and Honorable members of the House Committee on Resources. Thank you for taking time to listen to testimony from tribal leaders regarding Indian Trust Reform and particularly posing the question, "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?" My name is Keller George, and I am appearing this morning on behalf of the United South and Eastern Tribes, Inc.(USET). I am a member of the Oneida Indian Nation's Men's Council and have served as USET's President for eight years. As you know, USET is an inter-tribal organization comprised of 24 federally-recognized Indian Tribes. USET is dedicated to assisting its member tribes, through epitomizing the highest ideals of Indian leadership, in dealing effectively with public policy that affect Indian people; and serving the broad needs of Indian people. USET serves a population in excess of 60,000 Indian people in twelve different states.

The USET member Tribes feel strongly that they must work for the advancement of Indian people while maintaining a strong sense of self-determination. Because of this strong belief, USET has been actively involved in the Trust Reform and Re-organization efforts from the very beginning. I served as a representative of the USET Tribes, along with James T. Martin, USET Executive Director and Peter Schultz, Vice-Chairman of the Mohegan Tribe of Connecticut, on the initial Department of Interior/ Tribal Trust Reform Task Force. USET spent many hours analyzing the various issues of re-organization and trust reform in an effort to provide insight and tribal perspective on the changes that are currently taking place and those that are forecast in the years to come. I believe that the experience gained through this process has produced valuable knowledge that can be used by all parties to forge the Bureau of Indian Affairs into an agency that operates more efficiently.

Today's hearing is posing the question, "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?" That question can not be posed without addressing the broader issues of overall trust reform. USET will address six areas of concern regarding trust reform: Continuing Litigation, Consultation with Tribes, Reform/Re-organization vs. General BIA Operation, Incorporation of Trust Principles, Creation of an Under-Secretary Position, and Regional Level Re-organization relationships.

Continuing Litigation

The Cobell litigation is widely perceived as being the catalyst which first sparked trust reform discussions and exposed the gross mismanagement of Indian Trust Assets by the Department of the Interior (DOI) and the Bureau of Indian Affairs (BIA). USET recognizes the need for the Cobell plaintiffs to seek resolution and obtain an adequate remedy of law. The litigation, however, is reaching a dangerous point where the court has threatened to appoint receivership over the BIA and trust assets. The plaintiffs have argued that while they appreciate tribal input, Cobell is an Individual Indian Plaintiff's case. If a receivership is appointed, it becomes everyone's case. Receivership could negatively affect numerous Indian programs and service

delivery systems to Indian tribes.

The Cobell case is also making members of Congress impatient and less likely to have an open ear regarding this issue. Most recently, the Interior Appropriations Bill passed by the full House Appropriations Committee on June 25, 2003, contains an anti-Indian rider, Section 137. Section 137 is an effort to curtail the Cobell v. Norton litigation. In short, Section 137 would call on the Secretary of the Interior to conduct a "statistical sampling" of trust fund accounts in a manner that the Secretary alone deems feasible and appropriate given the availability of records. Under this proposal the Secretary would adjust the balances in Indian trust accounts. These adjustments would be final and judicial review would be severely constricted. Section 137 is problematic from an Indian policy standpoint. It is another effort by the House Interior Appropriations Subcommittee to determine the substantive legislative course of Federal Indian policy. It is improper for the Appropriations Committee to legislate on these important issues without proper consultation with tribal governments. USET objects to Section 137 and any other Appropriation riders that bypass the government-to-government consultation with tribal governments. This is clearly legislating on an Appropriations Bill in violation of House Rule XXI 2.(b). No hearings have been held on this proposal, and there has been no consultation with tribes or with individual Indian account holders. Tribal leaders have expressed interest in beginning dialogue on settlement options for trust claims, but the process must be fair and respectful of the interests of tribal governments and individual Indian account holders.

It is time to introduce legislation following proper consultation, that will bring a fair settlement to the ongoing litigation. USET is in favor of such legislation and working with Congress to develop a resolution to the case. The Cobell litigation is a drain on the federal government and is depleting funding that could go to other Indian programs or to enhance the re-organization effort. Even if the Cobell case is decided in favor of the plaintiffs, Congress would be hard pressed to appropriate the large settlement that would be due them. A large settlement to the plaintiffs would inevitably hurt the rest of Indian country during these hard economic and budget restricted times. We must get beyond Cobell in order to realize true and lasting trust reform. USET believes that any legislation that will achieve buy-in of the concerned parties must contain a Congressionally authorized and appointed committee to assist the DOI in conducting the components and/or processes that the intent of Section 137 wishes to bring about.

Consultation with Tribes

An attempt was made by the DOI/Tribal Trust Reform Task Force to work through many of the current re-organization issues and hold consultation meetings with tribal leaders regarding suggestions from the Task Force. This has since failed due to "road blocks" in the negotiating process. The DOI officials have stated that they have consulted with the tribes on the various re-organization issues that are being instituted, however, this is not totally true. Consultation is not throwing an idea out into Indian country, seeing a negative response, and moving forward with the idea regardless. Consultation is listening to tribal concerns and taking those comments into account. Lately the DOI has made consultation into a mere ritual they must go through in order to push the DOI's agenda. Negotiation is an essential part of consultation and while you may not be able to please everyone, the majority opinion should prevail in the end.

Some aspects of the re-organization efforts do reflect tribal views, but the two main points tribes wanted addressed, the Under-Secretary position and Trust Principals, remain untouched. Tribes stated from the beginning of the process that these two items must be incorporated into any re-organization efforts in order to establish a sense of accountability within the BIA. Tribes are still waiting to see these very important priorities given attention.

It all comes down to the issue that the Tribes must be re-engaged if the reform process is going to be successful. Tribes are receiving ambiguous and confusing information about the re-organization activities, which is extremely frustrating. Tribes must be involved in the entire process, not just shown the end product. The Department of the Interior and Bureau of Indian Affairs are not holding to their policy of meaningful consultation with tribes. We fear that without consultation and clear information the new re-organized structure will be perceived in the same negative light that has plagued the BIA for years.

Reform/Re-Organization vs. General BIA Operation

The first issue that has become a byproduct of the reform process is the struggle between the establishment of an organization that upholds the fiduciary trust responsibility on the one hand, while maintaining general operations on the other. This internal struggle has become obvious in the past several months as the re-organization process has been pushed into its initial phase. USET agrees that trust and

other functions need to be separated, however, in the BIA's re-organization structure two competing organizations have developed. The OST and the BIA must compete against each other for authority, resources, and manpower. This struggle will always exist unless certain issues are addressed.

From the beginning of the Trust Reform process, Tribes have made it clear that the DOI should not use program dollars to help fund the mistakes of the Administration. Tribes have stressed that the BIA's funding should not be diminished in order to fund the trust efforts of the OST. The BIA is in dire straits and must have additional funds in order to accomplish a truly successful re-organization. USET tribes fear that the majority of trust funding will be directed to the OST where the BIA will have to request the use of funds for trust activities. This makes the BIA subordinate to the funding needs of another organization and the employees of the BIA dependant upon two sources of direction for performing tasks. This could be extremely detrimental to the efficiency of processes within the BIA's new organization.

USET is committed to trust reform and the much needed re-organization of the Bureau of Indian Affairs. The mismanagement and trust issues are escalating problems that must be dealt with immediately for the sake of future generations. The Land Consolidation and Fractionation problems alone, if solved today, would take years to organize and properly manage. There are numerous unmet needs in Indian country in addition to Trust Reform which cannot be ignored. Programs such as Law Enforcement, Welfare, Social Services, and Education should not be "taxed" in order to pay for the mismanagement of the federal government's trust responsibility to tribes. New funding must be provided to the BIA for this re-organization process, while other programs should operate as intended without interference from budget restraints due to re-organization.

Trust Principles

Recent Supreme Court decisions have concluded that the federal government has avoided fiduciary trust responsibilities and operated with "bad-faith" in its business relationships with Indian tribes. In *United States v. Navajo Nation*, the Supreme Court stated that the

Mitchell and Mitchell analysis must focus on a specific right-creating or duty-imposing statute or regulation. In this case, the Court held against imposing a trust obligation on the Government. It reasoned that the existence of a trust relationship alone is not sufficient to support a claim for damages under the Indian Tucker Act (28 U.S.C. §1505). Conversely, in *United States v. White Mountain Apache*, the Court acknowledged the statute at issue did not expressly subject the Government to fiduciary duties of a trustee. Nonetheless, the Court determined that the Fort Apache property was expressly subject to a trust. In so doing, the Court drew a "fair inference" to find an obligation on the part of the Government to preserve the property as a trustee, and determined that its breach of trust was enforceable by damages.

From these cases, we have learned that unless a statute or regulation imposes a specific fiduciary obligation on the part of the Government toward tribes and their resources, the Court will look unfavorably on the imposition of such a duty. We have also learned that trust principals must be clearly defined in order for the Government to be held accountable for a breach of trust duties. In a sense, Indian country was fortunate that the Court felt compelled to infer a trust obligation in the *White Mountain Apache* decision; Indian country was not so lucky in *Navajo Nation*. The dichotomy of rationales created by these decisions indicates that without clear guidelines and definition of trust principles, the Court will continue to infer-or ignore as the case may be-the Government's fiduciary responsibility towards Indian tribes. Indian tribes must be allowed to hold their trustee accountable for mismanagement of their resources. We must begin by defining trust principles that create consistency in application across all trust activities. Tribes should no longer be forced to find remedy through the courts.

The tribal leadership of the Trust Reform Task Force made a concerted effort to get the DOI to incorporate a list of general Trust Principles, that could be used as a reference point for all trust activity, into the re-organization efforts. This suggestion was adamantly opposed by the DOI members of the Task Force, as they wanted to wait until the Supreme Court had

provided decisions in both *White Mountain Apache* and *Navajo Nation*. These two cases have had opinions written and both re-affirm, now more than ever, the need for a standardized set of trust principles.

Indian country should not be held at bay any longer by pending cases in the Supreme Court. The time is now for the federal government and the Secretary of the Interior to be held accountable for their trust responsibility. It is critical that continuity and accountability be established as a cornerstone of the re-organization efforts. There can be no oversight of the trust relationship without a standardized set of general

trust principles in place. Indian country must have a way to hold their trustee accountable for actions taken that may be contrary to the advancement of Indian people.

Under-Secretary Position

USET tribes have stressed from the beginning of the reform process the need to have Indian Affairs authority elevated to a Secretariat Level within the Department of Interior (DOI). Many tribes feel that the DOI overlooks the needs of the BIA, consequently tribal issues are pushed to the bottom of the list of DOI priorities. There is a strong need for an Under-Secretary of Indian Affairs position to be established in order to remedy the ambivalent attitude toward Indian affairs that has been so apparent within the DOI.

Through legislation, USET feels that the creation of an Under-Secretary could greatly benefit Indian people. Both tribal leaders and federal officials on the Trust Reform Task Force reached general consensus on creation of the new position. This common ground shows that both Indian country and the administration support the elevation of Indian affairs within the Administration. Tribes envision the Under-Secretary as having direct contact with the Secretary of the Department of the Interior regarding all Indian issues, as well as exercising authority over other bureaus within the DOI in regard to their Indian trust responsibilities. Currently other DOI bureaus report to the Secretary of the Interior and there is little communication or collaboration among the different bureaus regarding Indian trust issues. It is vitally important that all bureaus understand the importance of the federal government's trust obligation. An Under-Secretary could instill this trust responsibility across the bureaus and within the BIA, whereas the Assistant Secretary of Indian Affairs does not have any authority over other bureaus. This is the most direct way to ensure that Indian issues receive the attention, resources, and respect they deserve and to assure successful trust reform.

Regional Level Re-Organization

Many hypothesis are circulating throughout Indian country as to how the regional re-organization of the Bureau of Indian Affairs will actually work. There has been little direct discussion between the federal government and tribal leaders regarding this level of re-organization despite repeated requests from Indian country. The new Department Manual once again is unclear as to all of the multiple and complex relationships expected at the regional level and below. Tribal leaders are confused and need clarification. Will there be Trust Officers at every regional office? Who will they answer to directly? What will be their relationship with other BIA regional staff? What will the relationship be like between the Trust Officers and BIA officials? Who will have final determination authority? These are the types of questions that Tribes need answered in order to understand the complexity of the situation.

USET has spent countless hours analyzing the new Department Manual, the Cobell reports to the court, and the relationships between OST employees and BIA employees. USET believes these regional position interactions are based on an oversight (OST employees) and work product (BIA employees) relationship. The BIA employees at the regional level should be responsible for service delivery to the tribes, while the OST Trust Officers should be responsible for ensuring the trust responsibilities of the federal government are upheld. Trust positions should also be able to provide beneficiaries with resources concerning trust issues and look into any complaints of mismanagement by the BIA.

Furthermore, there is confusion as to how the OST Trust Officers will perform these oversight functions. In past discussions, the idea of Memorandums of Agreement (MOA) between the OST and the BIA were suggested. These MOA's would allow the BIA regional and agency level offices to "contract" the trust responsibility from the OST. The OST would then be free to focus totally on the oversight issues of ensuring that trust obligations are upheld by the BIA. If there are going to be two "stovepipe" organizations established to handle trust, one must be in charge of the implementation while the other organization must focus on oversight and standards of service.

These interactive relationships as described are merely speculative and based on USET's analysis of the DOI Department Manual. There are many grey areas in the Department Manual that need further clarification. However, if USET's analysis is correct, the new structure could be a viable tool to reaching greater efficiency within the BIA.

Conclusion

There is not a simple answer to the question, "Can a process be developed to settle matters relating to the Indian Trust Fund Lawsuit?" The fulfillment of the government trust responsibility to Indian tribes and

individual Indians is complex. USET Tribes support reform and understand that re-organization is necessary for the government to fulfill its fiduciary responsibilities. Many tribes feel like efforts to this point have been futile and the DOI is moving forward with their own agenda. USET recognizes the urgent need for tribes to be actively engaged in the reform and re-organization processes. Future generations of Indian people are depending on tribal leaders to take a stand and approach reform with a united voice. It is time to have that voice heard through legislation being developed and true consultation with the administration. The process has become stagnate over the past several months, but now is the time for Congress, Tribes, and the Administration to be active and involved.

In closing, I would like to emphasize the great importance of proper trustee accountability and the federal trust obligation. Efficiently operated trust programs could benefit Indian country greatly, but we all know the chaos that a poorly operated trust system can produce in Indian country. Indian people have given so much to the federal government based on the promise of adequate management of assets through the Trustee relationship. That relationship has been severely damaged, and must be mended.

Mr. Chairman and Honorable Committee Members, USET stands ready to assist in the processes of mending the relationship, establishing accountability of trust, and re-organization of the BIA. USET tribes have the experience and knowledge to work through these issues, all we need is someone to tap into those valuable resources. Thank you for taking the time to listen to tribal comments and take them into consideration. USET looks forward to working with Congress to reach lasting solutions and I would be pleased to answer any questions you may have regarding the USET testimony.